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No. 1248

In the

Supreme Court of the United States

OCTOBER TERM, 1965

GERALD A. SCHROEDER and CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

STATE OF ILLINOIS, BERNARD J. KORZEN, COUNTY TREASURER OF COOK COUNTY, TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11 EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS, FOR THE USE AND BENEFIT OF BOARD OF EDUCATION, SCHOOL DISTRICT 57, COOK COUNTY, ILLINOIS, WILBERT J. J. WAHLER and DANIEL W. PECYNA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To: The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Respondents Trustees of Schools and Board of Education* submit this brief in opposition to the petition for certiorari.

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* Under the Illinois School law, there are two school agencies within each school district: (1) a board of education, which builds the schools and operates the school system (Ill. Rev. Stats., 1965, Ch. 122, §§ 10-10, 10-20 *et*

Additional Statutory Provision Involved

28 U.S.C. § 2283:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Question Presented For Review

Does a United States District Court have jurisdiction to review collaterally a state court's judgment in an eminent domain case in which the court had jurisdiction of the subject matter and the parties, particularly when the sole challenge to the judgment is that the state court erroneously decided a question of state law?

Statement Of The Case

This case is an attempt to litigate for the fourth time the right of the school district to take the 405 East Rand Road property in Mount Prospect, Illinois, for school purposes. The history of this litigation to and including petitioners' fourth appeal to the Supreme Court of Illinois is reported in *Trustees of Schools* v. *Schroeder,* 23 Ill.2d 74 (1961); *Trustees of Schools* v. *Schroeder,* 25 Ill.2d 289 (1962); *People ex rel. White* v. *Busenhart,* 29 Ill.2d 156 (1963) (deciding consolidated appeals in two cases). The following is a summary of that history:

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* (Continued)

seq.), and (2) trustees of schools, who hold title to school land for the use and benefit of the board of education (Ill. Rev. Stats., 1965, Ch. 122, §§ 5-2, 5-21). The school defendants, *i.e.*, the Trustees of Schools and the Board of Education, are sometimes collectively referred to in this brief as the "school district."

The Condemnation Trial and the First Appeal.

The condemnation action giving rise to these proceedings was commenced in the Circuit Court of Cook County, Illinois on November 6, 1959 against petitioners, Gerald A. Schroeder and Clara A. Schroeder, who then owned the land in question. After the Schroeders' amended traverse was denied, the case was tried, and a jury awarded them $267,083.33. The circuit court granted the school trustees' motion for new trial, from which order the Schroeders appealed to the Illinois Supreme Court. That court reversed in *Trustees of Schools* v. *Schroeder,* 23 Ill.2d 74 (1961) and directed entry of the judgment upon the verdict. (The court declined to review the validity of the taking until final judgment had been entered.)

Proceedings on Remand.

On remand, the circuit court entered judgment on the verdict, and the school trustees deposited the amount of the judgment, which with interests and costs totalled $280,956.10, with the county treasurer. The circuit court thereupon entered an order finding fee-simple title in the school trustees and putting them in possession.

The Second Appeal.

The Schroeders again appealed, challenging the validity of the taking. The sole point they raised was that their land could not be taken because an Illinois statute forbade the school district from taking land within forty rods of the owner's dwelling. The Illinois Supreme Court held that the statute did not have that effect and affirmed in May, 1962. *Trustees of Schools* v. *Schroeder,* 25 Ill.2d 289 (1962).

After their counsel had filed a petition for rehearing in the Supreme Court, the Schroeders retained new coun-

sel. These new counsel filed in the Illinois Supreme Court a motion for a stay and a motion for leave to file an additional petition for rehearing. The court denied these motions and, on September 27, 1962, denied rehearing.

Further Proceedings in the Trial Court.

While the petition for rehearing was pending, the Schroeders, through their new counsel, filed various motions and petitions in the trial court seeking to raise new points challenging the validity of the taking. After the denial of rehearing by the Supreme Court, the trial court overruled these various petitions and motions. The trial court also granted the school authorities a supplemental writ of possession directing the re-eviction of the Schroeders (who had unlawfully reoccupied the property while the school was being constructed).

The "Taxpayers' Suit."

At about the same time, in September, 1962, the Schroeders, purporting to join with them certain other alleged taxpayers, filed a petition (under Ill. Rev. Stats., 1961, Ch. 113, § 44) for leave to file a taxpayers' suit for injunction, which also sought to challenge the validity of the taking. The circuit court denied leave to file the taxpayers suit.

The Third and Fourth Appeals.

The Schroeders thereupon appealed to the Illinois Supreme Court from the judgment denying leave to file the taxpayers' suit and from the order overruling their various petitions and motions in the condemnation suit in which they had sought to raise new points challenging the validity of the taking. The Illinois Supreme Court consolidated these appeals (over the objection of the

Schroeders) and in May, 1963, affirmed the circuit court. *People* v. *Busenhart,* 29 Ill.2d 156 (1963).

With reference to the Schroeders' petitions and motions in the condemnation case, the court held that all points therein raised were or could have been raised in the second appeal and therefore were conclusively adjudicated against the Schroeders by the decision on that appeal. (29 Ill.2d at 159.) Turning specifically to the fee-simple-title argument, the court continued (29 Ill.2d at 159-60):

> "Despite the rule [barring the raising of any point that could have been raised on the prior appeal], the prayer of the petition for the taking of a fee-simple title, and the failure to even include the question in the traverse,* the Schroeders contend that it goes to the jurisdiction of the court and can be raised either directly or collaterally. In *Chicago Housing Authority* v. *Berkson,* 415 Ill. 159, the right of the condemnor to acquire property by eminent domain was questioned and alleged to be jurisdictional. It was there said, at pages 161 and 162: '* * * (T)he objection was waived by failure to raise it at the appropriate time. The objection goes only to the right of the condemnor to acquire property by eminent domain. It does not effect the general jurisdiction of the court over the subject matter of an eminent domain action.' There, the condemnor's right to acquire by eminent domain was attacked, while here only the extent of the estate

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* Although the traverse and amendment thereto are attached to the petition for certiorari as Appendix D, they are not a part of the record in this case and are obviously not judicially noticeable by this Court. Nevertheless, if the Court sees fit to go outside the record and read them, it will see that contrary to the erroneous representation to this Court in the petition (p. 13), the Illinois Supreme Court was correct in stating that the right of the school trustees to take fee-simple title is not raised in the traverse.

to be taken is alleged to be grounds for going behind the judgment. We are of the opinion that the fee-simple-title question is barred."

With reference to the taxpayers' injunction suit, the Illinois Supreme Court stated that the petitioners therein again sought to raise "the points urged in the eminent domain case." The court held that its judgment in the second appeal in that case was "not subject to collateral attack since the court had jurisdiction of the subject matter and the parties." (29 Ill.2d at 162.)

Petitioners filed a petition for rehearing which was denied. They did not file a petition for certiorari in this Court.

The Instant Action.

The Schroeders next filed the instant action, which seeks to litigate for the fourth time* the question of whether the school district had the right to take the land for school purposes. They ask for a declaratory judgment that the state court judgments and orders in the condemnation case are void; that plaintiffs be declared to be the rightful owners of the condemned property; and that the State of Illinois, the Trustees of Schools, and the School District be enjoined "from exercising any ownership over the premises herein and before described, or interfering with the rights of the plaintiffs as the rightful owners of the premises." (A. 20-21.)

In support of their request for this relief, plaintiffs assert that by reason of the taking of their property by

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* (1) The condemnation proceeding culminating in the final adjudication on the second appeal. (2) The attempt to re-litigate the judgment in the circuit court and on the third condemnation appeal. (3) The "taxpayers' suit" and the appeal in that case. (4) The case at bar.

eminent domain they were denied due process and rights, privileges, and immunities guaranteed them by the Fifth and Fourteenth Amendments to the Constitution of the United States. (Complaint, par. 7, App. 10-11.) They assert that this occurred when the Illinois courts held that the Trustees of Schools had acquired fee-simple title despite the Schroeders' contention that, under the Illinois school law, there could be no judgment for fee-simple title but only an easement in favor of the school authorities. (Complaint, pars. 10-14, A. 11-12.)

Argument

I.

PETITIONERS' CONTENTION IS BARRED BY PRIOR STATE COURT ADJUDICATION

This proceeding is an attempt to relitigate in the federal courts a question of state law that has already been litigated, relitigated, and finally adjudicated between these same parties in the state court.

Whether an Illinois school district can acquire land in fee simple, or may acquire only an easement, is obviously a question of state law. Likewise whether the Illinois condemnation court had jurisdiction to determine the nature of the title the school district acquired is a question of Illinois law.

When petitioners appealed the trial court's decision on the validity of the taking to the Illinois Supreme Court, they chose to argue only one point, *viz.*, that their land could not be taken because an Illinois statute forbade taking property by eminent domain within forty rods of an owner's dwelling. The court held against them and sustained the validity of the taking. *Trustees of Schools* v. *Schroeder,* 25 Ill.2d 289 (1962).

When petitioners sought in a third appeal to raise a question not theretofore presented, the fee-simple-title question, the Illinois Supreme Court applied the accepted rule of appellate procedure that "no point which was raised, or could have been raised in a prior appeal on the merits, can be urged on a subsequent appeal, and those not raised are considered as waived." *People ex rel White* v. *Busenhart,* 29 Ill.2d 156, 159 (1963). This has always been the rule in Illinois. *People* v. *National*

Builders Bank, 12 Ill.2d 473, 476-77 (1957); *Union Mut. Life Ins. Co.* v. *Kirchoff,* 149 Ill. 536, 542 (1894), *error dismissed,* 160 U.S. 374 (1896). This universal principle of appellate procedure has long been the rule in this Court. *Illinois* v. *Illinois Central Railroad Co.,* 184 U.S. 77, 92-93 (1902); *United States* v. *Camou,* 184 U.S. 572, 574 (1902). As this Court said in the latter case, "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation."

Petitioners argued on the third appeal that the fee-simple title question was "jurisdictional" and therefore could be raised at any time. The Illinois Supreme Court rejected this contention and expressly held that as a matter of Illinois law "the extent of the estate to be taken" is not "grounds for going behind the judgment," and that the judgment of the condemnation court that the school trustees acquired fee-simple title was a valid judgment entered by a court having jurisdiction of the person and subject matter and could not be relitigated or collaterally attacked. (29 Ill.2d at 159-160, 162.)

The Traverse.

The court also noted that petitioners had not even raised the fee-simple title point in the traverse to the condemnation petition. (29 Ill.2d at 159.) We have pointed out above (p. 5, footnote) that petitioners' assertion outside the record that the point was there raised is erroneous. It should also be noted that petitioners' statement (Petition, p. 13) that this was the "only" basis for the court's decision is incorrect. This was at most an alternative ground, albeit a perfectly sound one.*

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* Illinois follows the usual rule that "matters not raised in the pleadings nor passed upon by the trial court cannot be presented for the first time on review." *People* v. *Anderson,* 31 Ill.2d 262, 264 (1964).

The Petitions for Rehearing on the Second Appeal.

Petitioners also go outside the record to assert (Petition, p. 7) that the petition for rehearing which the Illinois Supreme Court denied on the second appeal raised the fee-simple title question. This assertion is erroneous. The petition for rehearing that was filed did not raise the fee-simple title question. It was limited to the forty-rod question. Petitioners did seek to raise the fee-simple title question later, in an additional petition for rehearing which they sought leave to file long after the time allowed by rule for filing a petition for rehearing had expired. The court denied leave to file that additional petition.

The question could not have been raised for the first time on rehearing even in a timely petition. The Rules of the Illinois Supreme Court, like those of most reviewing courts, prohibit raising points for the first time on rehearing. (Illinois Supreme Court Rule 44, Ill. Rev. Stats., 1965, Ch. 110, § 101.44.)

The Amount of Land Taken.

Petitioners attempt to twist the fee-simple title vs. easement contention asserted in the complaint into an argument that the school district took "more of the title than [it] had any authority to do." They couple this with the assertion of the claim that the school district took "more of petitioners' land than [it] had any authority so to do." (Petition, p. 14; see also pp. 3, 12.) Yet by their statement of the relief sought in the complaint (Petition, p. 11) they tacitly concede that the latter claim is not made in the complaint in this case.

Petitioners never attempted to present this question of the amount of land taken to the Illinois Supreme Court, not even on the third appeal in the condemnation case. (29 Ill.2d at 159.) The question of the amount of land

the school district was entitled to take for a school could have been raised in the condemnation case in the Illinois Supreme Court. Like all other questions as to the validity of the taking that were raised or could have been raised in that case, that question was adjudicated by the final judgment in that case. It cannot be the subject of a collateral attack in a United States District Court.

The Authorities Cited By Petitioners are Inapposite.

Petitioners cite no case in which this Court or any federal court has countenanced collateral review of a final judgment in a civil case rendered by a state court having jurisdiction of the subject matter and the parties. There are no such cases.

There was no collateral attack on a state court judgment in *City of Cincinnati* v. *Vester,* 281 U.S. 439 (1930), cited on page 14 of the petition. Under Ohio law, the question of whether the taking was "for a public use" could be raised only by an injunction proceeding independent of the condemnation action. The injunction proceeding brought for the purpose of raising this question was filed in the federal court on the ground of the federal constitutional question it raised. There was no relitigation of a state court judgment.

County of Allegheny v. *Frank Mashuda Co.,* 350 U.S. 185 (1959), referred to on pages 15 and 16 of the Petition, did not involve relitigation of a state court proceeding. It was a diversity action brought to determine a claim that had not previously been litigated in any court. This Court held that an action to determine the right to take property by eminent domain could be brought as a diversity case in the federal district court, since under Pennsylvania law such an action could be maintained separate-

ly from the proceeding to determine just compensation. There was no attempt to review a state court judgment.

Similarly, the three cases cited on pages 17 and 18 of the Petition did not involve collateral review of state court judgments but were actions brought originally in the federal courts to assert federal rights. *McGuire* v. *Sadler,* 337 F.2d 902 (5th Cir. 1964); *Monroe* v. *Pape,* 365 U.S. 167 (1961); *United States* v. *Price,* 86 Sup. Ct. 1152 (1966).

The three cases involving racial restrictive covenants cited on page 16 of the Petition involved review by certiorari of state reviewing court judgments, not collateral attacks on those judgments in an independent federal proceeding. *Shelly* v. *Kraemer,* 334 U.S. 1 (1948); *Barrows* v. *Jackson,* 346 U.S. 249 (1953); *Hansberry* v. *Lee,* 311 U.S. 32 (1940). Petitioners, in the case at bar, filed no petition for certiorari from the judgment of the Supreme Court of Illinois.

Finally, petitioners' reference, page 19, to *Townsend* v. *Sain,* 372 U.S. 293 (1963), and their assertion that "the rights of land owners are entitled to the same protection from unlawful acts by state officials as in the liberty of persons charged with crime," ignores the statutory basis for the *Townsend* case and the other federal habeas corpus cases. The Habeas Corpus Act confers on federal district courts jurisdiction they would not otherwise have, *i.e.,* jurisdiction to review collaterally claims of violation of federal constitutional rights at the instance of a person convicted of a crime by the state court. See Mr. Justice Frankfurter's concurring opinion in *Brown* v. *Allen,* 344 U.S. 443, 499-500 (1953). Congress has refrained from granting the federal courts comparable power to review collaterally the decision of constitutional questions by

state courts in civil cases. *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415 (1923). *A fortiori*, the federal district courts have no power to review collaterally the decision by state courts of questions of state law.

In summary, the Schroeders were free to raise any issue they chose when they challenged the validity of the taking in the condemnation proceeding. They elected, when they appealed on the validity of the taking, to raise only the forty-rod issue. They did not seek to raise the fee-simple-title issue or any other issue until after the Illinois Supreme Court had decided against them and affirmed the condemnation judgment conferring fee-simple title on the school trustees. (25 Ill.2d 289.) Obviously it was too late then to raise that issue or any issue that could theretofore have been raised.

II.

NO FEDERAL QUESTION IS PRESENTED

Petitioners' contention, reduced to its essentials, is that the Illinois courts decided a question of Illinois law erroneously, and that this deprived them of their property in violation of their constitutional rights.

It is well settled that such a claim does not raise a federal question. "Mere error in a judgment entered by a state court having jurisdiction over the parties and the subject matter is not sufficient to raise a federal question under the Constitution." *Chance* v. *County Board of School Trustees*, 332 F.2d 971, 974 (7th Cir. 1964). Even a claim that the state court erroneously decided a federal constitutional question does not give a federal district court power to review collaterally the state court judgment. In *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413, 415 (1923), the Court said:

> "It affirmatively appears from the bill that the judgment was rendered in a cause wherein the circuit court had jurisdiction of both the subject matter and the parties; that a full hearing was had therein; that the judgment was responsive to the issues, and that it was affirmed by the Supreme Court of the State on an appeal by the plaintiffs. 191 Ind. 141. If the [federal] constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state court to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication."

The Civil Rights Act does not permit relitigation of valid judgments of the state courts. In *Bottone* v. *Lindsley,* 170 F.2d 705 (10th Cir. 1948), the Court stated (170 F.2d at 707):

> "It is shown upon the face of this complaint that the appellant regularly invoked the jurisdiction of the State Court, the case was tried, judgment was rendered, appealed to and affirmed by the Supreme Court of Colorado. * * * Without more, it is clear that the appellant was not denied due process of law or the equal protection of the law, cognizable under the Civil Rights Act."

Accord, Goss v. *State of Illinois,* 312 F.2d 257, 259 (7th Cir. 1963); *Spriggs* v. *Pioneer Carissa Gold Mines, Inc.,* 251 F.2d 61, 62 (10th Cir. 1957). In the latter case the court said (251 F.2d at 61-62):

> "The substance of the prolix and redundant complaint is that the protracted state court litigation had the designed conspiratorial effect of depriving appel-

lant of his adjudicated property rights without due process or the equal protection of the laws. The litigation complained of is found in the reported decisions. . . .

"It is sufficient for purposes of this appeal to state that every act complained of was done and performed in the prosecution and decision of matters in a court of competent jurisdiction. The court in each instance had jurisdiction of the subject matter and of the parties, and was authorized and empowered to decide the issues presented. It follows that no claim can be stated under the Civil Rights Act."

III.

THE DECLARATORY JUDGMENTS ACT DOES NOT CONFER JURISDICTION OVER THIS ACTION

Relief under the Declaratory Judgments Act (28 U.S.C. § 2201, *et seq.*) is not available unless an independent ground of federal jurisdiction exists. This Court so held in *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950):

> "'[T]he operation of the Declaratory Judgment Act is procedural.' * * * Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction. When concerned as we are with the power of the inferior federal courts to entertain litigation within the restricted area to which the Constitution and Acts of Congress confine the, 'jurisdiction' means the kinds of issues which give right to entrance to federal courts. Jurisdiction in this sense was not altered by the Declaratory Judgment Act."

Since there are no independent grounds of federal jurisdiction present here, the District Court could not assume jurisdiction of petitioners' complaint under the

Declaratory Judgments Act. *Chance* v. *County Board of School Trustees*, 332 F.2d 971, 974 (7th Cir. 1964).

IV.

28 U.S.C. § 2283 PRECLUDED THE DISTRICT COURT FROM ENTERTAINING THIS ACTION

An additional ground, though none is needed, supporting the District Court's dismissal and the Court of Appeals' affirmance is 28 U.S.C. § 2283. Petitioners' complaint asked the District Court to stay enforcement of the judgment of the state court awarding the school district fee-simple title to the land. Section 2283 precluded the District Court from doing so. That section provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

That section construed in *Nongard* v. *Burlington County Bridge Commission*, 229 F.2d 622 (3rd Cir. 1956), in which the court said (229 F.2d at 625):

> "The plaintiffs are merely complaining that a New Jersey equity court which had them before it adjudicated a controversy controlled by state rather than federal law in a way that was arbitrary and grossly unfair to them. In no meaningful sense can it be said that a federal court acts 'in aid of its jurisdiction' if it undertakes to enjoin what the state court has thus ordered. We conclude, therefore, that Section 2283 prohibits federal injunctive intervention here."

Accord, H. J. Heinz Co. v. *Owens*, 189 F.2d 505, 507-08 (9th Cir. 1951). Several cases apply Section 2283 to federal actions seeking to enjoin state court condemnation judgments or condemnation proceedings in state

courts. See *Chance* v. *County Board of School Trustees,* 332 F.2d 971, 974 (7th Cir. 1964); *Collins* v. *Laclede Gas Co.,* 237 F.2d 633, 636-37 (8th Cir. 1956), *cert. denied,* 352 U.S. 1025 (1957); *Baber* v. *Texas Utility Co.,* 228 F.2d 665, 666 (5th Cir. 1956); *Evans* v. *St. Louis Housing Auth.,* 226 F.2d 750, 752 (8th Cir. 1955), *cert. denied,* 350 U.S. 993 (1956).

Finally, Section 2283 may not be circumvented by alleging that the proceedings to enjoin enforcement of a state court judgment is brought under the Civil Rights Act or the Declaratory Judgments Act. *Goss* v. *State of Illinois,* 312 F.2d 257, 259 (7th Cir. 1963).

Title 28, Section 2283 clearly bars the instant action.

V.

UNDER ILLINOIS LAW THE ILLINOIS COURT HAD POWER IN A CONDEMNATION PROCEEDING TO CONFER FEE-SIMPLE TITLE ON THE SCHOOL TRUSTEES

Finally, although it is unnecessary for this Court to reach the point, petitioners' substantive contention (*e.g.,* Petition, pp. 12, 13) that the Illinois condemnation court did not have "jurisdiction" to grant a fee-simple title to the school trustees is entirely without merit.

The absurd proposition that a school district cannot acquire fee-simple title to land in Illinois, but is only entitled to use the land subject to the reversionary interest of the owner, is flatly refuted by the Illinois decisions. The Illinois Supreme Court held in *City of Waukegan* v. *Stanczak,* 6 Ill.2d 594 (1955) that a school district had the power to acquire a fee-simple title by eminent domain proceedings. The Court said (6 Ill.2d at 605):

> "Where the power to take is a power to take 'real property,' the grant authorizes taking 'all interest

> held or claimed in lands in fee, for life or for years,' including a fee-simple interest."

Although the *Stanczak* case involved a special charter, the powers granted by charter were substantially the same as those granted by the 1959 Illinois School Code, which is controlling in this case. Section 7-17 of the Code (Ill. Rev. Stats., 1959, Ch. 122, § 17) provided that the school board had the power:

> "To buy or lease one or more sites for school houses, with necessary ground."

It further provided:

> "The board may take and purchase the site for a school house, either with or without the owner's consent, by condemnation or otherwise."

In addition, the Code gave the school trustees power to take title to school sites (§ 4-21) and to sell school sites and grounds (§§ 4-22, 4-23). Obviously if the trustees' interest terminated upon cessation of the school use, as petitioners contend, the trustees would never have anything to sell. Moreover, "The trustees of schools . . . having legal title to school sites or land owned for school purposes" are given power, with the consent of the school board, to grant easements (§ 4-28).*

In the *Stanczak opinion* (6 Ill. 2d 594), the court relied upon its earlier decision in *Miner* v. *Yantis,* 410 Ill. 401, 405 (1951), which it said "expressly refuted" the "contention that power to acquire 'real estate' for school pur-

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* The sections cited appear in Ill. Rev. Stats., 1959, Ch. 122. The 1961 School Code, which succeeded the earlier code, made no substantial change. The provisions of the present code comparable to the cited provisions of the 1959 Code are Ill. Rev. Stats., 1965, Ch. 122, §§ 10-20.10, 5-21, 5-22, 5-24, and 5-29.

poses was limited to an easement or determinable fee," and upon *Sanitary District* v. *Manasse,* 380 Ill. 27, 33 (1942), which held that a statute similar to the cited provisions of the 1959 School Code empowered the Sanitary District of Chicago to take a fee-simple title by eminent domain.

To the extent that *Kelly* v. *Bowman,* 104 F. Supp. 973 (E.D. Ill. 1952), *aff'd,* 202 F.2d 275, 276 (7th Cir. 1953) (Petition, pp. 12-13), is inconsistent with the *Stanczak* case and the 1959 Illinois School Code, it is not the law of Illinois. Obviously, the decision of the Illinois Supreme Court on a question of Illinois school law is controlling.

It is accordingly clear, regardless of the fact that the district court had no jurisdiction to review collaterally the judgments of the Illinois Supreme Court, that the judgment of the Circuit Court of Cook County granting the school trustees a fee-simple title to the land, affirmed by the Illinois Supreme Court on its second appeal, was correct on the merits.

CONCLUSION

This action is patently frivolous. The petition for certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

NO. 1268

GERALD A. SCHROEDER and CLARA JOHNSON SCHROEDER,

Petitioners,

vs.

STATE OF ILLINOIS, BERNARD J. KOERZEN, COUNTY TREASURER OF COOK COUNTY, TRUSTEES OF SCHOOLS OF TOWNSHIP 42 NORTH, RANGE 11 EAST OF THE THIRD PRINCIPAL MERIDIAN, COOK COUNTY, ILLINOIS, FOR THE USE AND BENEFIT OF BOARD OF EDUCATION, SCHOOL DISTRICT 57, COOK COUNTY, ILLINOIS, WILBERT J. J. WARLICH and DANIEL W. PECYNA,

Respondents.

BRIEF OF RESPONDENT, STATE OF ILLINOIS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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